



IN THE COURT OF APPEAL

AT KISUMU

CORAM: KARANJA, MARAGA & KANTAI, JJ.A.

CIVIL APPEAL NO. 1 OF 2014

BETWEEN

MASENO UNIVERSITY.....APPELLANT

AND

UNIVERSITIES ACADEMIC STAFF UNION.....RESPONDENT

(An Appeal from the Judgment of the Industrial Court of Kenya at Kisumu (Hellen Wasilwa, J) dated 181 September 2013

in

Industrial Cause No. 814 (N) OF 2009)

JUDGMENT OF W.KARANJA J.A

Maseno University (appellant) is a public university duly incorporated under the University Act (Cap 200 D of the Laws of Kenya). Universities Academic Staff Union which goes by the acronym UASU (respondent), is a trade union duly registered under the Labour Relations Act 2007. UASU filed the claim in the Labour and Employment Court on behalf of five of its members namely; Prof Adhiambo Odhuno, Dr. Mary Goretti, Dr. Billy G Ng'ong'ah, Prof. Inyani K. Simala and Mr. Elevestone C Zenge Mwang'ombe, claiming unlawful and unfair termination of their employment services.

All five claimants were employees of the appellant having been employed at different times and held different positions as at the time the cause of action herein is said to have arisen. By way of summary their status was as follows:-

(a) Prof. Adhiambo Odhuno was employed as an Associate Professor on 12th February, 2003 in the department of Textile Design and Merchandising.

(b) Dr. Goretti Kariaga was employed as a Senior Lecturer in the Department of Botany and Horticulture on 181h December, 1996.

(c) Dr. Billy G. Ng'ong'ah was employed as a tutorial fellow on pt September 2004 and rose to the position of a full lecturer.

(d) Prof. Inyani K. Sima/a was employed by Maseno University College (the predecessor of Maseno University, in March 1995 as a senior lecturer and rose by merit to the rank of associate professor in Kiswahili.

(e) Mr. Elvestone C. Zenge Mwan'gombe was employed as a tutorial fellow on 29th May 1999 and rose to a full time lecturer in the department of Interior Design.

Their letters of employment were annexed to their claim filed before the trial Court. In their amended memorandum of claim dated 17th December 2009, they prayed for remedies as follows;

(a) An order that Maseno University to unconditionally reinstate Professor Adhiambo Odhuno, Dr. Mary Goretti Kirianga, Dr. Billy G. Ngonga'h, Prof. Prof K. Inyani K. Sima/a and Mr. Elvestone C. Zenge Mwangombe to their employment services and former positions with the respondent without any loss of benefits or seniority and without any conditionality and other remedies specified and sought above in the memorandum in respect of each of them.

(b) A recommendation that the University be censured for unlawfully terminating the employment services of Prof. Adhiambo Odhuno, Dr. Mary Goretti Kiringa, Dr. Billy G. Ng'ong'ah, Prof. K. Inyani K Sima/a and Mr. Elvestone C. Zenge Mwangombe and that they be adequately compensated for the time lost out of employment.

(c) In the alternative and without any prejudice to the foregoing, the respondent be ordered to fully compensate the claimant for unfairly, unlawful and wrongful termination of the employment services of claimant's members Prof. Adhiambo Odhuno, Dr. Mary Goretti Kirianga, Dr. Billy G. Ng'ong'ah, Prof K. Inyani K. Sima/a and Mr. Elvestone C. Zenge Mwangombe with all their attendant benefits and entitlements as outlined in this memorandum and their respective terms and conditions of service.

Facts of the Case

All five claimants gave oral evidence before the trial court in respect of the circumstances that led to their dismissal. We revisit here in brief the evidence tendered by each of them.

(a) 1st claimant- Prof. Adhiambo Odhuno

She testified that she was employed on Iih February 2003 as an Associate Professor in the Department of Textile Design and Merchandising in the service of Maseno University. She was initially on probation for a period of one year effective from the time she reported. She signed an acceptance to this appointment on 3rd March, 2003 and joined the service in June 2003. She continued working at the appellat university until November, 2006 when she was served with a "show cause" letter by respondent indicating that between 20th and 23rd November 2006 she had not taught as required. She replied to this letter vide her letter marked as Annexure A2. Her response was that there were no courses allocated to her for the period mentioned. She also brought to the attention of the respondent that the personal number PF/N0/1153 on the memo sent to her was not her number, but PF/N0/1139 and so she assumed that the memo was sent to her in error. There was no reply to her letter other than some remarks scribbled on the letter and returned to her by the Deputy Vice Chancellor Academic Affairs stating that indeed the letter was meant for her despite the error in the Personal File Number. The Deputy Vice Chancellor (Academic) also indicated that indeed no courses were allocated to her during the period because she continued with the strike and refused to sign a return- to - work formula.

She told the court that during the period of 20th to 23rd November 2006 the whole university, she included, was on strike. She also indicated that she was not in a position to sign a return to work formula as this could only be done by UASU and the university.

On 10th January 2007, she received another letter - Annexure A3 summoning her to appear before a staff disciplinary committee on 18th January 2007 at the university boardroom where she was expected to

answer to the following charges;

(i) Committing an offence of gross misconduct and neglect of duty and professional incompetence contrary to Article 25.2.1(b) of the Terms of Service for Academic Staff Maseno University.

(ii) That on or about 17th November 2007, she refused to sign the return to work declaration/commitment form thereby defying the University's instruction to all staff to sign the form a condition to resuming work.

(iii) That she had consistently failed to discharge her duties as per the required standard in the aspects of setting, making and teaching her courses.

However before that hearing, one more charge was leveled against her, to the effect that she had not surrendered an imprest. At the disciplinary hearing, she responded that UASU had not officially called off the strike and like everybody else, she could not be on duty. In relation to the charge of not doing her work, the disciplinary committee accused her of setting the same examination twice.

Her response to this charge was that she was teaching the same course to two different classes, the standard was the same, and so there was a likelihood of the exams being similar.

On the issue of the unsurrendered imprest, she explained that she was working on a project and could not surrender the imprest unless the project was complete. Subsequently, she accounted for this imprest and surrendered. It turned out that it was actually the University that owed her Ksh 34,400/= from this surrender and it paid her the said amount in the year 2012.

After the disciplinary hearing, in spite of the explanation she had given, she received a letter terminating her services. The letter, which she produced in evidence, indicated that she had failed to perform other duties and had committed an offence of a scandalous nature by not surrendering imprest.

She further testified that at the disciplinary hearing she was not given an opportunity to be represented by any official of UASU who were not allowed into the university grounds. She stated that she had previously taught at Egerton University from where she was actually head - hunted by the Maseno University Vice Chancellor to go and teach at Maseno University on account of her good record.

She asked the Court to reinstate her unconditionally with all her benefits. She also prayed for her salary from March 2007 to the date the matter would be determined. In the alternative she asked to be paid all her terminal benefits from March 2003 to the date the suit would be determined. She claimed that she had not gotten any other employment after her sacking, blaming the Vice Chancellor for influencing other Vice Chancellors against giving her a job. She had received regrets from Egerton University and Moi University and only managed to get a part time job in 2011.

On cross examination, Prof. Odhuno said she was terminated on 2nd February 2007, for taking part in a strike which had been declared as unlawful by the ministry of labour. On the issue of incompetence in her work, she told court that this was not brought to her notice and if she had some weaknesses, her head of department should have discussed the matter with her. She said that the disciplinary committee used the strike issue to bring in other issues.

(b) 2nd claimant- Dr. Mary Goretti

She told the Court that she was working at Masinde Muliro University, as at the time the matter was being heard. She had been employed as a lecturer in the Department of Botany and Horticulture in 1994. In November 2006, apart from being a lecturer, she was an elected treasurer of UASU Maseno Chapter. She told the court that on 23rd October 2006, the national union called for a strike after failing to negotiate for a new pay deal with the government. There was a requirement that the Chapters call their meetings and decide whether they were going to join the strike. On 19th October 2006, the Maseno

University called their meeting which she was unable to attend due to other commitments. The Maseno University went ahead and declared that they were joining the strike. The strike took effect and teaching was paralyzed. After the strike, there was a declaration that the strike was illegal and people should go back to work. She went back to work but was pulled out of class and told she should not teach without clearance from the Vice Chancellor. She was accused of inciting lecturers to go on strike and organizing meetings on campus on 23rd and 24th October, 2006 without the permission of the university authorities. However, she told court that she had not participated in these meetings as she was very busy preparing to attend an international conference. She was however accused of participating in the strike and causing some adverts to be placed in the newspapers. She was asked to attend a disciplinary committee meeting to answer charges as follows:-

(i) Organizing a meeting at the Graduation Square on University Campus on 23rd and 24th October, 2006 without permission from the university as is required by regulation.

(ii) Inciting lecturers to go on strike meetings on various dates despite the fact that the strike had been declared illegal by the Minister for Labour and an Industrial Court order restraining staff from going on strike being in force.

At the committee meeting she defended herself and stated that the allegations were not true, but the committee was very hostile to her. She told court that she was performing her duties well and there was no indication to the contrary. On 4th December 2006, she was on suspension when the Minister for Labour announced that the strike was illegal. She decided to go back to teach. She denied inciting any students as they were not on campus and never went on the rampage.

After the hearing, the university issued her with a termination letter on 1st February 2007. Her appeal against this dismissal was rejected. She then filed a Judicial Review Case No. 963 of 2007 in Nairobi asking the court to set aside the university's decision. The court ruled in her favour and quashed the decision of the university terminating her services. The university never reinstated her and instead lodged a notice of appeal with the registrar of the Industrial Court on 27th September 2013 as prescribed under Rule 75 of this Court's Rules..

This appeal is premised on the said notice of appeal. An application seeking stay of execution was filed before the Industrial Court on 29th October 2013. Temporary orders of stay were granted pending the hearing of the application inter-partes on 7th November 2013. It is however not clear from the record whether the application was ever heard inter-partes as scheduled or whether the said orders were ever extended. The claimant still sought orders of reinstatement before the Industrial Court in the cause giving rise to this appeal. She also prayed for compensation for the years she was out of employment until 20th September 2007 when Masinde Muliro University employed her. She also asked for compensation for the emotional injury she suffered.

3rd Complainant- Dr. Billy Ng'ong'ah

Dr. Ng'ong'ah told court that he was employed by the respondent in September 1994 as tutorial fellow and rose to the rank of a lecturer. He was also a member of the claimant's union and Secretary General of Masinde Muliro University UASU Chapter. In October 2006, the union called for a strike after negotiations with the Inter Public University Consultative Forum failed. He was suspended on 24th October 2006. The reason given for the suspension was that he had disobeyed a court order declaring the strike illegal. His testimony however was that he had not been served with that court order. He was never called for any disciplinary hearing but just received a letter of termination dated 20th November, 2006. It was alleged that he had usurped the power of the University Senate by advising students not to report to the University, vide an advert in the Sunday Nation newspaper of 19th November 2006, advising the students not to report back to college until the strike issue was resolved. He appealed the dismissal but the appeal was dismissed without a hearing. He filed a Judicial Review application in Nairobi H. C. Misc. Appl. No. 527 of 2007, in which his summary dismissal was quashed and the University ordered to treat his case within its rules and regulations as provided in Section 25 of Maseno University Act 2003. A disciplinary committee was constituted to hear and determine his case in respect of the following charges

which were leveled against him.

- (i) Professional misconduct,
- (ii) Insubordination and conduct that is scandalous and disgraceful.

The facts were that on 19th November 2006 he caused to be published in The Sunday Nation newspaper, an advertisement advising students and sponsors that students should not report to the University as earlier advised by the institution knowing that it is only Senate that has that prerogative. No other detailed particulars were given. He did a detailed response, but his services were terminated on 28th May 2009. His appeal against the decision did not elicit any response.

He sought from the Industrial Court, orders as follows:- (a) Immediate and unconditional reinstatement,

(b) Payment of all withheld dues as from November 2006

(c) Payment of all his salary up to his anticipated date of retirement in 2031. He said that he had been unable to get any employment since dismissal.

On cross examination he told the court that he does part time teaching at Great Lakes University and he is the Secretary General of Maseno University Chapter. He admitted attending the Union meeting on 16th November 2006 when it was resolved that the Union puts up an advertisement advising parents, sponsors, students against reporting until the strike was resolved. He said some Union members put up the advert which bore his name and he could not stop them from doing so. He maintained that he was unfairly dismissed as no valid reasons were given for his dismissal.

4th claimant Prof. K. Inyani Simala

Prof. Inyani told the Court that he was employed by the respondent as a lecturer on 18th March, 1995. On 27th October 2006 he was issued with a suspension letter in which he was accused of disobeying a court order which he was not aware of. He was later dismissed vide the letter dated 23rd November 2006. The reasons given for his dismissal were:-

- (i) Being a fervent messenger of those bent to dissuade Maseno University Academic Staff resuming work.
- (ii) Refusing to sign a back - to - work - commitment.

He stated that he was never given any audience by the University. He appealed against the dismissal to the chairman of the University Council following a ministerial statement that all dismissed staff should appeal. He also appealed to the Vice Chairman of the University Council and also wrote a letter to the minister for education on 5th June 2007. His appeal was ignored.

He moved the court for orders of reinstatement and payment of all his monies since he has been out of employment. He also prayed for issuance of a certificate of service.

On cross examination, he told the court that he was dismissed through a letter dated 23rd November 2006 and his memo of claim was filed on 18th December 2009.

He is currently an Associate Professor of cultural linguistics and dean of faculty of education and social sciences at Masinde Muliro University where he was employed on 1st June 2008. He was to be paid for the period he was out of employment from November 2006 to May 2008. He said he was never on strike and did not participate in any strike.

5th claimant- Elvestone C. Zenge Mwangombe

Mr. Mwang'ombe told the court that he was employed by Maseno University on 29th May 2000 as a lecturer in graphic design. He worked for the University well until November 2006 when a strike was declared by UASU. In his department, teaching did not go on. Following the action by UASU, he was given a letter by the respondent to show cause why he should not be disciplined for not teaching. He responded to the letter stating that he was not the one who called the strike and could not call it off and go back to work. He later went back to teach on 24th November 2006 but his head of department told him that he could not teach until the Vice Chancellor had cleared him. He was later called for a disciplinary committee meeting referring to his incompetence to teach. He was charged with committing an offence of gross misconduct and neglect of duty contrary to Article 25.2.1 of the terms of service for Academic Staff of Maseno University, in that on or about the 17th November 2006, he refused to sign the return to work declaration/commitment form thereby defying the University's instruction to all staff to sign the form as a condition of resuming work.

He appeared before the disciplinary committee on 16th January 2007 but was thereafter served with a termination letter dated 1st February 2007. The letter indicated that he had appeared before the committee for charges of gross misconduct, neglect of duty and professional incompetence contrary to Article 25.2.1(b) of the Terms of Service for Academic Staff of Maseno University and he was found guilty of the offence. It was further indicated in the letter that the committee took serious exception of the fact that he had consistently failed to discharge his duties as required in the department and also noted that his academic background was wanting as it was impossible for him to get admission to any university for a post graduate degree, and was therefore unlikely to proceed to attain a Masters and PhD degrees, which are minimum qualifications to be a lecturer at the University. He appealed against this termination but his appeal was dismissed.

After the termination of these five claimants, the union reported a dispute to the minister for labour. The conciliation attempts did not bear fruit and so the matter was subsequently referred to court under case No. 105 of 2006 and the court declared the strike unlawful and ordered the Union and its members to resume duty immediately in any case not later than 25th October, 2006.

RESPONDENT'S CASE

By way of summary, the respondent's response in respect of each of the claimants was as follows;

On Professor Adhiambo Odhuno, the respondent conceded that she was employed by the respondent as claimed. It also conceded that her services were terminated on 2nd February 2007, for reasons not solely connected with the strike issues. It was the Respondent's evidence that Professor Adhiambo committed an offence of gross misconduct, neglect of duty, and professional incompetence contrary to Article 25.2.1 (b) of the terms of service for Academic staff of the respondent's university. She was said to have failed to discharge her duties as per the required standard in setting, marking examination and teaching courses, among other deeds. According to the respondent, even after the court had declared the strike unlawful vide Cause No.105/ 2006, and ordered the claimants to return to work immediately, she had failed to do so. Issues of her performance were said to relate to failure to teach and issues with the external examiner in respect of the 2005/2006 academic year. This issue had not been raised as a disciplinary one before the strike as the academic year ended in July 2006. On the issue of imprest, it was alleged she did not submit moneys given to her. This was in relation to the refurbishing of an office of the Vice Chancellor. The project was ongoing at the time the charges were brought up. She finally surrendered the imprest.

A notice to show cause had been served on her in accordance with the respondent's relevant regulations but she had failed to explain why she had failed to resume duty as ordered by the court. It was the respondent's case that her work and performance had been assessed by her supervisor and external examiners as deplorable. The respondent gave several examples of the alleged incompetence, but it is not necessary for us to analyse the same in greater detail. It was the respondent's case however that due process was followed and she was therefore lawfully terminated. According to the respondent, the claimant had even collected her terminal dues including the pension benefits amounting to Ksh. 319,113.90 and she therefore has no claim against the respondent.

As concerns Dr. Billy Ng'ong'ah the respondent's case is that he was indeed an employee of the University but he arrogated himself powers of Senate and asked students not to report to the University, against the administration directive to the students to report back for studies. He did this by putting an advertisement in the Sunday Nation newspaper dated 19th November 2007. His appeal against the sentence was dismissed for lack of merit. He filed before the High Court Nakuru Judicial Review Application No.527 of 2007. The matter was heard and the respondent's decision quashed, with the High Court ordering the Respondent to reconsider the claimant's case in accordance with the respondent's rules and regulations. The process was restarted and the claimant's case was heard afresh. He was found at fault and was dismissed a second time. It was the Respondent's case that Professor Ng'ong'ah thereafter collected his terminal benefits including the pension amounting to Ksh. 840,825.16. The respondent urged the Court to dismiss this claim.

On Mr. Elevestone Mwangombe, the respondent's case is that he was terminated for failing to perform his duties and also for professional incompetence as he failed to produce a master's degree certificate. That, he was initially appointed after he informed the university that he was in the final stages of completing his master's degree. He was said to have had a checkered record of indiscipline during his service with the respondent. He was given a letter of show cause on these issues and also called for a disciplinary hearing to defend himself. He was found at fault and his services were therefore properly terminated. An appeal against the termination was dismissed on merit.

In relation to Prof. Inyani, the respondent's contention is that he is currently in employment at Masinde Muliro University. That he was actually discharged because during the period of the strike, he actively participated in threatening other members of staff with dire consequences if they did not participate.

About Dr. Mary Goretti Karianga, the respondents contend that she was dismissed by the University after she issued directives to students and lecturers not to go to the University. She was also a signatory of the order for space of the advertisement. Other than this she failed to discharge her duties. This was brought to her attention during the disciplinary hearing and in the hearing she admitted having a problem with external examiners who pointed out that her work was not satisfactory, and this is what led to her sacking. Her appeal was dismissed and she filed High Court Misc. Application No.963 of 2007 which gave orders in her favour.

As stated elsewhere in this judgment, an appeal was filed against that decision, and temporary orders of stay were granted, but the fate of the appeal is still not known to this Court.

Dr. Ngo'ngah was terminated because of the same advertisement. He filed a case and the court found the termination was not proper. He was then taken through the motions of a disciplinary hearing and the committee found that the advertisement amounted to gross misconduct. The charge never related to his performance. He admitted that there was a return - to - work formula signed indicating that people would return to work without victimization. He admitted that the advertisement was done before the strike had been resolved. It was the respondent's case that the 5 were not terminated because they refused to sign a return to work formula. Prof. Inyani on the other hand was never given any disciplinary hearing and this was at the height of the strike. The respondent however contends that the 5 were not terminated because of the strike but for 3 of them, the issues related to non-performance. There was confidential communication on the same but which was not brought forward for disciplinary action. The respondent denied that the issue of performance was incidental.

After considering the evidence before her, the learned judge narrowed down the issues of determination to the following:-

- (1) *Whether the case against the 4'h claimant (grievant), namely Prof Jnyani Simala was time barred as claimed.*
- (2) *The applicable law in the matter.*
- (3) *Whether the respondent was justified in terminating the claimant's services, and*

(4) what were the reasons for their dismissal and lastly

(5) Whether the claimants were entitled to any to any remedies.

On the first issue, the learned Judge called into aid the provisions of Section 14(9)(c) of the Trade Disputes Act (repealed) which states as follows:-

"The court shall not take cognisation of any trade dispute or deal with any matter connected therewith while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written law."

The learned judge found that the claim in question was not time barred as the 4th claimant could not file his claim while the matter was still in the hands of the conciliator.

On the issue of the law that was applicable to the dispute, the learned judge observed that the Employment Act 2007 came into operation on 2nd June 2008 after the claimant's contracts of employment had been determined. She therefore, found that the applicable law was the repealed Trade Disputes Act (pursuant to claus4 of the 5th schedule of the Labour Relation Act and the repealed Employment Act (Cap 226 Law of Kenya) which was the one in operation when the dispute in question arose.

As to the reasons given for the termination of the claimants, the court found that although there were other disciplinary issues pending in respect of the claimants as outlined in their letters informing them of their charges, their termination was for reasons related to their participation in the strike. It was the learned judge's view, and she so held, that the strike in question had been called by the National Secretary General of UASU and only the same office could have called it off.

On this issue, the learned Judge has been faulted because according to the respondent herein, the Minister for Labour pursuant to Section 27(2)(c) of the Trade Disputes Act (repealed) had the power to declare a strike in the public sector unlawful. Ground II of the appellant's memorandum of appeal is predicated on that finding. Ground 12 is in the same line but this is on whether a court of competent jurisdiction had declared the strike unlawful.

We shall revert to that issue later.

As far as the 1st claimant was concerned, the learned judge found that since her employment at the Respondent University on 12th February 2013, her performance had not been called into question .If there were any issues pertaining to her performance, her attention had not been drawn to the same. It was only after the strike issue that she was charged with the other offences. According to the learned judge, the dismissal was purely on account of the 1st claimant's participation in the strike.

In respect of 2nd claimant - Dr. Mary Goretti, the learned judge found that her termination had actually been quashed by the court, the effect of which was a reinstatement to her position before the dismissal. The learned Judge found that the reinstatement notwithstanding, Dr. Goretti was dismissed for her role in the lecturers' strike, which the learned Judge held was also wrongful.

On Dr. Ng'onga's dismissal ostensibly for misconduct, it was the learned Judge's finding that he was also dismissed for his involvement in the strike, and so were the 4th and 5th claimants.

Having found that all the claimants were victimized for their role in the strike, the learned judge proceeded to make a finding, that the strike was lawful. She consequently made a finding that the termination of all the claimants was "unjustified and unfair" and she converted the termination to a "normal termination" and proceeded to grant them the following reliefs:-

"(1) 12 months' salary as compensation for unlawful termination amounting to:-

1st grievant - Ksh 118,249 X 12 = 1,418,988

2nd grievant- Ksh 105,050 X 12 = 1,260,600

3rd grievant - Ksh 105,050 X 12 = 1,260,600

4th grievant - Ksh 118,249 X 12 = 1,418,988

5th grievant - Ksh 103,333 X 12 = 1,240,656

(2) Each grievant shall be issued with a certificate of service.

(3) Each grievant is entitled to their terminal benefits calculated at 15 days for each year worked upto the day of this judgment as follows:-

1st grievant - 19 years Ksh 1,123,365.50

2nd grievant -15 years Ksh 787,875.00

3rd grievant-10 1/2 years Ksh 551,512.50

4th grievant - -15 years Ksh 886,867.00

5th grievant-17 years Ksh 878,798.00

Total for each grievant:-

1st grievant =1,418,988 + Ksh 1,123,365.50 = 2,542,353.50

2nd grievant =1,260,600 + Ksh 787,875.00 = 2,048,475.00

3rd grievant =1,260,600+ Ksh551,512.50= 1,812,112.50

4th grievant =1,418,988 + Ksh 886,867.00 = 2,305,855.50

5th grievant =1,240,656 + Ksh 878,798.00 = 2,119,454.00

All the payments are subject to statutory deductions."

Being dissatisfied with the judgment and orders of the court, the appellant filed this appeal raising about thirteen grounds of appeal.

On the other hand, UASU filed a notice of cross appeal citing dissatisfaction with some aspects of the judgment now impugned. The appellant faulted the learned Judge for awarding each of the claimants 15 days salary for each year worked as terminal benefits upto the date of delivery of the judgment saying that the same had no basis in law.

It was the appellant's contention that some of the claimants had already obtained salaried employment elsewhere as the matter was still in court and therefore, even assuming that the 15 days salary was payable, which in their view it was not, then the award ought not to have been extended upto the date of delivery of the judgment.

The appellant also faulted the learned Judge for making an erroneous finding to the effect that the claimants' employment was terminated on account of their participation in the strike. The learned Judge also erred in relying on recommendations of the Committee of Experts of application of the conventions in relation to unjustified dismissal published in 1995, instead of relying on Municipal Law which was

self-sufficient.

It was also a ground of appeal that the learned Judge failed to appreciate the provisions of Section 27(2) (c) of the Trade Disputes Act (repealed) which empowered the Minister to declare a strike in the public sector unlawful. The appellant further raised the ground that the court had pronounced itself on a matter that had not been raised before it, which matter had not been contested by the parties. This was the issue of the Court order in Industrial Cause No. 105 of 2006, which had declared the strike by the respondent's members unlawful.

The last ground was that the learned Judge had erred in converting the termination of the claimant's employment contract into a normal termination and in the process failing to appreciate that Prof. Odhuno, Dr. Kariaga, Dr. Ng'ongah and Mr. Mwang'ombe's contracts of employment were terminated, and their salary in lieu of notice and pension dues had already been paid to them.

The appellant entreated the Court to allow the appeal and set aside the impugned judgment.

The respondent's cross-appeal also seeks the setting aside of the same judgment in its entirety but for different reasons which we shall advert to shortly. Its other prayer is that this Court after setting aside the said judgment should declare that the claimants were never terminated, and that they should be allowed to proceed back to work.

It was the respondents ground of appeal that the claimants were never terminated as the University Council as a body is not the one that made the decision to terminate their employment. They contended that the court had failed to compute other statutory benefits such as payments in lieu of leave, unpaid claims for teaching and other outstanding payments which in their view had been pleaded and proved. They also faulted the learned judge for applying the repealed Trade Disputes Act and Employment Act when considering the claim but basing the award on the current employment statutes.

At the hearing of the appeal, learned counsel Mr. Ouma & Mr. Enonda appeared for the appellant and the respondent respectively.

Amplifying the grounds of appeal encapsulated earlier in this judgment, Mr. Ouma told us that the claimants were not entitled to the terminal benefits as calculated by the court. His submission was that under the repealed Employment Act (Cap 226 Laws of Kenya) and the Employment Act 2007, the damages awardable to the claimants as damages for termination was 12 months' salary. He urged that there was actually no claim for termination benefits in the amended memorandum of claim. We have reproduced elsewhere in this judgment the three main prayers sought by the claimants in the amended statement of claim.

He further submitted that the learned judge had erred in her finding that most of the claimants were jobless when indeed some of them had already been employed by other institutions as at the time the matter was heard. By awarding them damages calculated upto the date of judgment, the court had endorsed an act of unjust enrichment on the part of the claimants.

Further, Mr. Ouma submitted that the strike had already been declared illegal by a court of concurrent jurisdiction and the learned judge ought not to have ignored that court's finding and pronouncement.

The court was also faulted for applying Article 50 of the Constitution of Kenya 2010 to a matter whose cause of action had accrued before the birth of the said constitution. This was on the issue of the right of an employee to be heard before the decision to terminate him/her is made. Tied to this is the issue of whether or not the learned judge was right in applying ILO Convention 158 which was not even ratified in Kenya. We shall revert to these two issues shortly.

It was Mr. Ouma's submission that the Judge ought to have applied the provisions of the Employment Act (Cap 226 Laws of Kenya) and the Trade Disputes Act (both repealed) as these statutes comprehensively provided for remedies in case of unlawful termination. He concluded by urging that the respondents were

properly and lawfully terminated and they were not therefore entitled to any compensation. He urged us to allow the appeal and set aside the impugned judgment.

On his part, Mr. Enonda urged the cross appeal whose thrust was that the claimants had never been terminated, lawfully or otherwise and were still employees of the appellant. His argument was that under the Maseno University Act, and more particularly statute XVII, it was only the University Council which was vested with the power to terminate senior staff, and in as far as the purported terminations were carried out by the Disciplinary Committee of the Council, they were unlawful. He submitted that appeals by some of the claimants to the council had been ignored, and so their cases had not therefore been conclusively determined.

Learned counsel told the Court that Maria Goretti's termination had been quashed by the Court and so she was still an employee of the appellant. On that point however, as we have adverted elsewhere, that decision was appealed against; orders of stay of the decision were granted and there was no evidence presented to the Court to the effect that either the stay orders had been vacated, or the appeal itself had been heard.

The other grievance with the Court's findings was that unpaid leave days, and other allowances which had been pleaded were not considered or awarded. The respondent wants this Court to determine those claims and award the sums claimed. The respondents therefore, urged the court to allow the cross appeal, set aside the judgment being impugned; find that the claimants are still employees of the appellant; and calculate and pay them any other benefits owed but not awarded.

I have considered carefully the entire record before me. I have also carefully considered the grounds of appeal and the cross appeal along with learned counsel's submissions on the same. Having done so, I have narrowed down the issues for determination as follows:-

First and most important is the issue as to whether the claimants' termination was justified. Was it lawful? Did the learned Judge err in finding that the terminations were unjustified and unfair?

Second, did the learned Judge apply the proper/relevant law that was applicable at the time?

Third: what were the available remedies if any?

On the cross appeal, did the Disciplinary Committee of the Council have power to terminate the claimants employment? Was their termination null and void for lack of authority or power on the part of the committee to terminate them?

Further, had the claimants claimed reliefs related to unpaid leave allowances etc or were their claims confined to the three reliefs at the end of the amended statement of claim as submitted by counsel for the appellant? Were such claims proved? If so, should this Court award them, as prayed in the cross appeal?

On the issue of unfair termination, it is important to note that the learned Judge, in determining whether the termination of the claimants was justified, invoked not the municipal law, but international Conventions. At page 36 of her judgment, she made the following observation:

"At the time the grievants services were terminated, the Labour Law regime was not as advanced as it is currently. However, that as it may be, Kenya is a member of the fLO and is expected to respect its international obligations including respect for international Labour standards...."

The Judge then went ahead to extensively quote and call into aid the Report of the Committee of Experts on the "Application of Conventions and Recommendations in Relation to Protection against Unjustified Dismissals" published in 1995.

The learned Judge then relied on the "Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of ILO" (5th Edition) to make a finding that the declaration by both

the University and the Minister that the strike was illegal had no force of law; as it infringed on the 'expert position on freedom of association'.

While making a correct exposition that Kenya has not ratified ILO Convention No.158, the Judge still went on to make the following pronouncement:

"However Kenya is a member of ILO and had an obligation to enforce rules of International law and in particular International Labour Standards."

Learned counsel for the appellant has faulted the learned Judge on this issue in ground II of the appellant's grounds of appeal, urged the Court to find in his favour.

This is a germane issue in my view and I have already identified it as one of the issues falling for determination. I must emphasise that national courts cannot ignore domestic statutes in favour of International Conventions. This is more so if the said Conventions have not been ratified by the State. I do not wish to broach into the question as to whether ours is a monist or dualist model of law for purposes of this judgment. Such a discourse will have to await another opportune moment.

As this appeal stands, there were domestic statutes that addressed issues of employment as at the time the cause of action herein occurred. These were the Employment Act (Cap 226) - (repealed) and the repealed Trade Disputes Act. They enjoyed primacy as far as resolution of labour disputes was concerned.

The learned Judge could not therefore, abandon them at will and seek solace in the more flamboyant and articulate ILO Conventions. That, in my considered view was a misdirection on her part. Nor could she invoke articles of the Constitution that were non-existent as at the time the cause of action arose.

As stated by the Supreme Court in the now famous Samuel Kaman Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Constitution of Kenya 2010 is forward looking and cannot be applied retrospectively.

Any Conventions that were not ratified, or domesticated into Kenyan law could only have had persuasive value but should not have been relied upon to determine the dispute as was done in this case. I find that the law applicable was the repealed Employment Act (Cap 226), and the Trade Disputes Act (repealed).

The Labour Relations Act which repealed the Trade Disputes Act came into force on 26th October 2007. Clause 4 in the fifth schedule of the said Act provides:-

"Where any of the following matters commenced before the commencement of the Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed)

(a) Any trade dispute that arose before the commencement of this Act;

(b) Any trade dispute referred to the Industrial Court before the commencement of this Act;"

The terminations herein happened between November 2006 and February 2007 and so they are covered by clause 4 of the 5th schedule cited above.

I must therefore agree with counsel for the appellant on that issue. I shall therefore consider whether the terminations subject of this appeal were unjustified or unfair within the confines of the repealed Employment Act and the repealed Trade Disputes Act which were the statutes in force then.

That brings me to the issue as to whether the terminations were fair.

Basically, the respondent's contention is that the claimants were dismissed purely for participating in the strike that it had called. Its argument is that the strike was legal. Further, that the Minister for Labour

could not have declared it as illegal.

The learned Judge upheld the respondent on this issue citing the provisions of the Report on the Committee of experts and the ILO Convention 158. The learned Judge particularly placed heavy reliance on the "Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO" (5th Edition), which states at paragraph 630:-

"It is contrary to freedom of association that the right to declare a strike in the Public Service illegal should lie with the heads of Public Institutions which are thus judges and parties to a dispute."

"... Responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved."

Relying on these excerpts of the Digest, the learned Judge came to the conclusion that the declaration by both the University and the Minister of labour that the strike was illegal, infringes the expert position on freedom of association and had no force of law.

As I have stated earlier on in this judgment, the said Conventions, Committee of Experts Report and Digest excerpts did not form the primary law applicable in this matter. In applying them holistically, to the exclusion of the applicable domestic or municipal law in force at the time, the learned Judge made a gross misdirection and may have arrived at the wrong conclusion.

What then was the position under the Employment Act and the Trade Disputes Act (both repealed)? Under Section 27(2) (2) of the repealed Trade Disputes Act, the Minister had power to declare a strike in the public sector unlawful. Public sector is defined in Section 27(4) to include *"Government, Local Government Authorities, any body incorporate or established for public purposes by an Act of Parliament or by regulations made thereunder."*

The appellant is certainly such a body. The learned Judge's pronouncement that the Minister's declaration was illegal to the extent that it infringed the ILO Committee of Experts Report was in my considered view, a gross misdirection. While still on this, I note that the Industrial Court had in Industrial Cause No. 105 of 2006 declared the strike by the respondent as unlawful. That was a Court of concurrent jurisdiction and the learned Judge should not have dismissed that court order in the manner that she did.

That said, I need to look at the circumstances that led to the termination of the claimants' employment contracts and determine if it was fair or not.

According to the appellant, the claimants were not terminated because of participating in the strike, but on the basis that each had a raft of complaints. They were served with the charges and asked to show cause. They are said to have been dismissed after they failed to show sufficient cause why they should not have been sacked. It was the appellant's contention that the issue of participating in the strike was just coincidental and that they were going to be sacked anyway.

I have considered these submissions. I agree that the claimants had been served with other charges and asked to show cause. I hold the view however, that the appellant was not about to terminate the claimants' services were it not for their participation in the strike. I say so because if you look at the other charges, some of them had been

lingering for a long time, yet no letter to show cause had been issued. Take for instance the case of Professor Adhiambo (1st claimant). She was accused of professional incompetence, and failing to surrender imprest amounting to Kshs. 294,850/=. Her explanation was that she could not have surrendered the imprest because the work she was doing with the imprest was ongoing. Indeed, after she surrendered the imprest later, the calculations showed that it was actually the appellant that owed her money. The appellant is said to have refunded to her the money she had used in the project over and above the imprest taken. On the issue of incompetence, the issue had not been raised with her prior to the

strike.

Even for Mr. Elvestone Mwangombe, who appeared not to have proper qualifications to teach at the University the issue had been ongoing for some time. Why was it acted upon only after the strike issue? The same can be said about the other claimants but I need not revisit all their charges.

What comes out clearly though, is that the disciplinary proceedings were precipitated by the claimants' participation in the strike. Whether the strike was lawful or not is in my view besides the point. What perturbs me is the manner in which these claimants were treated. There was clearly malice in the manner their cases were handled.

Some of them were not given a hearing before termination. It even took the intervention of the **High Court in Judicial Review No. 527 of 2007** to have Dr. Ng'ong'ah heard. Others filed appeals with the University Council but they were never responded to. This in my view was unfair and unjustifiable. I agree with the learned

Judge albeit for different reasons, that the terminations were unjustified and unfair.

Having so found, I also find that the remedy of 12 months monetary wages awarded to the claimants was in accordance with **Section 15(1) (ii)** of the repealed **Trade Disputes Act**. I find no reason to disturb the same.

On the issue of terminal benefits awarded by the court, I find no justification for the award. It came out in evidence that some of the claimants had already been paid their terminal benefits and other dues as indicated elsewhere in this judgment. I fail to understand the rationale used by the learned Judge to award terminal benefits to the claimants without considering that there was evidence that terminal benefits had already been calculated and paid out to those of them that were supposed to be paid, in accordance with their terms of service.

I would therefore interfere with the award and set aside the award on the terminal benefits. Endorsing that part of the award would amount to unjust enrichment on the part of the claimants.

The appellant's appeal therefore succeeds, to that extent only.

On the cross-appeal, the main issue is the payment of the claimants' benefits such as payments in lieu of leave, unpaid claims for part time teaching and others which they said were pleaded and proved.

Although I find, contrary to the submission of the appellants counsel, that the claimants did actually make such claims in the main body of the amended memorandum of claim, and attached annexures tabulating how the amounts claimed were arrived at, there was paucity of evidence adduced to support the same, and that would explain why the learned Judge did not award the said sums. I do not have sufficient evidence before me to enable me to award the claims in question as prayed in the cross appeal.

On the issue as to whether the claimants' services were terminated, I find that ground quite self-contradictory. I say so because as stated earlier, there is evidence that some of the claimants were paid and they accepted their terminal benefits. If they maintained that their services were never terminated, then the issue of terminal dues would not have arisen at all.

On whether the Disciplinary Committee of the Council has power to terminate a senior member of staff, or whether that is the preserve of the University Council, a keen reading of clauses 6 and 7 of statute XVII would seem to suggest that the Disciplinary Committee does have powers to discipline senior staff members.

Clause 6 provides as follows:-

"There shall be Disciplinary Committee of Council which shall consider all disciplinary cases of

members of staff provided that the council shall have the right to invoke the provisions of the Employment Act (Cap 226 of the Laws of Kenya) as may be appropriate."(Emphasis supplied)

Section 7 provides in the relevant part as follows:-

7. Subject to the provisions of the Employment Act (Cap 226) a member of staff may appeal against a decision of the disciplinary committee as follows:-

Academic, Senior Library and Administrative Staff to the Council.

From the above, it is clear that the Disciplinary Committee is endowed with power to consider all disciplinary cases. This provision does not go further to state that after considering the disciplinary cases, the Committee shall make recommendations to the Council for further action as to whether to terminate the officers or not. If that was the intention of the drafters of the regulations, they could have expressly so stated without any ambivalence or ambiguity.

The regulations go further to state that the decision of the Committee will be appealable to the Council. What decision would that be? Clearly, the committee had power to make decisions which are appealable to the Council, and that is what exactly happened in this case.

My finding is that the Disciplinary Committee has power/authority to hear and determine all disciplinary cases, and render decisions which are appealable to the Council. Nowhere in the statute and regulations is there a requirement that the Committee can only hear matters and then recommend action to the Council.

Section 4(a) which the respondent seems to call in aid only states that any person appointed under the statute may be removed from such office by the Council for good cause. It does not state that it is only the Council that can remove somebody from office. For these reasons, I hold the view that the Disciplinary Committee is endowed with power to hear, determine and make decisions as to whether a person is to be removed from office or not. The aggrieved person can then seek the Council's intervention by way of appeal.

Ground 2 of the cross appeal must therefore also fail. For the foregoing reasons, I am satisfied that the cross appeal lacks merit. The same is hereby dismissed.

On the main appeal, the same succeeds only to the extent that the award on terminal benefits is hereby set aside. Orders no. 1, 2 and 3 are nonetheless affirmed.

As the appeal has succeeded partially, and the cross-appeal having been dismissed in its entirety, I would propose that each party bears its own costs of the appeal and the cross-appeal.

I have read the dissenting judgment of Maraga J.A, and the concurring judgment of

Kantai J.A. As Kantai J.A is in agreement, the majority decision carries the day. In the circumstances, there shall be orders as proposed above.

Dated and delivered at Kisumu this 6th day of November 2015.

W. KARANJA

JUDGE OF APPEAL

JUDGMENT OF KANTAI. J.A

I have had the advantage of reading in draft the Judgment of my learned sister, W. Karanja, JA. I totally agree with it and I support the orders proposed.

Dated and delivered at Kisumu this 6th day of November 2015

S. ole KANTAI

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JUDGE OF APPEAL

JUDGMENT OF MARAGA, JA

Introduction

1. This is an appeal against the judgment of the Employment and Labour Relations Court (the ELRC) (Wasilwa, J.) at Kisumu delivered on 18th September 2013 in Industrial Cause No. 814 (N) of 2009. In that judgment, the learned Judge found that Maseno University, the appellant, had unlawfully dismissed five of its employees who were members of the Universities Academic Staff Union (the Union). In the circumstances, she converted those dismissals to normal terminations and awarded each of them 12 months salary as compensation for unlawful dismissal as well as terminal benefits equivalent to 15 days pay for each year worked up to the date of judgment.

Facts of the Case

2. The brief facts of the case were as follows. The Universities Academic Staff Union is a trade union at the material time duly registered under the Trade Unions Act^[1] (now under the Labour Relations Act, 2007^[2]). On 23rd October 2006 the Union called for a countrywide strike of its members on the grounds that there had been a breakdown in the negotiations for a new collective agreement in place of the then existing one between the Union and the Inter Universities Consultative Forum of which the appellant herein is a member.
3. The appellant denounce that strike as an illegal one contending that, acting under the provisions **Section 27(2)(c)** of the Trade Disputes Act (Cap 234 of the Laws of Kenya) (now repealed), on 13th October 2006 the Minister for Labour had declared that strike illegal. On 18th September 2013 the ELRC also declared the strike illegal in **Industrial Cause No. 105 of 2006**. The Union did not heed those declarations. Instead it went ahead with the strike.
4. Following that strike, the appellant purported to conduct disciplinary proceedings against its staff members, Prof. Adhiambo Odhuno; Dr. Mary Goretti Kariaga; Dr. Billy Ng'ong'ah; Prof. Kenneth Simala; and Mr. Elvestone Mwang'ombe (hereinafter referred to as "the lecturers") on the grounds, *inter alia*, that they had participated in an illegal strike and deserted their duties. Thereafter, Dr. Billy Ng'ong'ah and Prof. Kenneth Simala were summarily dismissed for gross misconduct and the services of the others were terminated. As stated in the Conciliators report dated 2nd June 1020 (should read 2010) they were all paid their terminal benefits.
5. On 8th January 2010, on behalf of the lecturers, the Union filed a claim in the ELRC. In its amended memorandum of claim filed in that Cause on 2nd July 2010, the Union claimed that the dismissal of the lecturers was illegal and sought on their behalf a raft of reliefs including immediate and unconditional reinstatement without loss of any benefits or alternatively payment of 12 months' salary as compensation for unlawful dismissal, arrears of salary as well as all outstanding dues and the costs of the cause.
6. In its memorandum in reply, the appellant averred that the claim by Dr. Goretti was *res judicata* and therefore an abuse of the court process and the one by Prof. Inyani Simala was statute barred. Without prejudice to that averment, the appellant claimed that the lecturers' services were lawfully terminated in accordance with the terms of their respective contracts of service on various grounds including participating in a strike that had been declared illegal; gross misconduct; professional

incompetence; desertion contrary to Article 25.2.1(c) of the terms of their service contracts and **Section 17(1)(a) & (e)** of the repealed Employment Act; and failure to sign a return to work formula.

7. After hearing the claim, Wasilwa, J. found that the strike was lawful and declared the lecturers' dismissals unlawful. Consequently, as I have stated, she converted the dismissals into normal terminations and awarded each lecturer terminal benefits of 15 days salary for every year worked and 12 months' salary as compensation for unlawful termination of employment.

The Appeal

8. Both parties were aggrieved by that decision. The appellant filed this appeal in which the Union filed a cross-appeal. In its 13 grounds of appeal, the appellant faulted the learned Judge for: failing to find that the respondents had indeed participated in an illegal strike which the Minister had, under **Section 27(2)(c)** of the repealed Trade Disputes Act^[3] and the Industrial Court in the said Industrial Cause No. 105 of 2006, declared illegal; failing to find that besides participating in an illegal strike, the appellants' contracts of service were lawfully terminated; converting the respondents' dismissal to normal termination and awarding the lecturers terminal benefits at the rate of 15 days salary for every year worked without any legal basis, which relief had not even been pleaded; and for disregarding municipal law and in its place applying unratified ILO Conventions^[4].
9. In its notice of cross-appeal, the Union complained that the learned Judge ignored its counsel's submissions and some of the lecturers' claims and based the lecturers' awards on inapplicable provisions of the current law; that the learned Judge misapprehended the import of the High Court decisions in Misc. Application No. 963 of 2007 and Misc. Application No. 527 of 2007; and that the learned Judge disregarded the Constitutional provisions safeguarding the lecturers' rights. On those grounds, the Union sought the setting aside the learned Judge's awards in their entirety, reinstatement of the lecturers or alternatively payment of their respective dues as pleaded in their statement of claim and proved.
10. Messrs Ouma and Enonda, learned counsel for the appellant, argued the 13 grounds of appeal globally. They submitted that there being no dispute that the strike had been declared illegal, production of a court order in that regard was otiose and the learned Judge therefore erred in faulting the appellant for that failure. The lecturers having participated in that illegal strike and boycotted their duties, they had breached their terms of service. Their dismissals and/or termination of their services was, in the circumstances, lawful and the award of damages to them had therefore no legal basis.
11. In the alternative and without prejudice to that submission, counsel for the appellant urged us to find that if the lecturers' dismissals and/or terminations were indeed unlawful, then, pursuant to **Section 15(1)** of the repealed Trade Disputes Act, the lecturers were only entitled to one month's salary in lieu of notice and 12 months pay as compensation. In the circumstances, counsel urged us to set aside the award of terminal benefits of 15 days salary for every year worked for being totally unfounded as it was not claimed and was neither one of the terms the parties' collective bargain agreement nor provided for in the repealed Employment Act.
12. Counsel for the appellant also faulted the learned Judge for failing to consider the fact that besides participating in an illegal strike and deserting their duties, the lecturers' services had also been lawfully terminated for flouting the Maseno University Act which governed their employment.
13. Counsel further took issue with the law the learned Judge relied on. They argued that the learned Judge erred in relying on the ILO Conventions which had, admittedly, not been ratified and Article 50(1) of the Constitution of Kenya 2010 which was promulgated long after the cause of action in this matter had arisen.
14. In his response, Mr. Enonda, learned counsel for the respondents, argued that in the absence of a

court order declaring the strike illegal, the learned judge cannot be faulted for finding otherwise and awarding the lecturers damages for unlawful dismissal. In addition, under Statute 17 of Maseno University, it is the Maseno University Council which had power to terminate the lecturers' services. There is, however, no iota of evidence of that Council sitting and terminating the lecturers' services. In the circumstances, he said, the lecturers' dismissal was therefore void *ab initio*.

15. In support of the cross-appeal, Mr. Enonda faulted the learned Judge for failing to appreciate the import of the High Court decisions in Misc. Application No. 963 of 2007 and Misc. Application No. 527 of 2007. He said those decisions quashed Goretti's and Ng'ong'ah's dismissals and reinstated them thus entitling them to their full back pays. Counsel also said the learned Judge erred in relying on the current labour law regime ignoring the Trade Disputes Act which had no time limit within which reinstatement could be ordered thus also denying the other lecturers the relief of reinstatement. In that regard, he submitted that the learned Judge also ignored the conciliator's report which had recommended the lecturers' reinstatement with no loss of benefits and a return to work formular with no victimization. In conclusion counsel for the respondent urged us to set aside all the awards and substitute them with awards of damages as prayed in the memorandum of claim.

Analysis and Determination

16. I have considered these rival submissions as well as the authorities and legal provisions cited by counsel for the parties. I have also read the record of appeal. I would like to start with the law applicable to the dispute in this matter.

17. Two of the lecturers were summarily dismissed and the services of the other three were terminated between 20th November 2006 and 2nd February 2007. The cause of action in this matter therefore arose in late 2006 and earlier 2007 before the enactment of the current labour law Acts.^[5] Although the claim giving rise to this appeal was filed on 18th December 2009, pursuant to Paragraph 2(4) of the Fifth Schedule of the Labour Relations Act, 2007 which provided that any claim whose cause of action arose before the enactment of that Act was to be determined under the repealed Acts, the learned Judge was right in relying on the provisions of the Employment Act^[6] and the Trade Disputes Act^[7] both now repealed.

18. Under the repealed Trade Disputes Act, unless the Industrial Court otherwise found, a strike was illegal if so declared by the Minister.

19. Pursuant to **Section 27(2)(c)** of the Trade Disputes Act, on 13th October 2006 the Minister for Labour declared the intended strike illegal. A copy of the Minister's order declaring the strike illegal is on page 354 of the record of appeal. Despite that, the lecturers and their colleagues countrywide went on strike on 23rd October 2006. The appellant claimed that on 25th October 2006, the Industrial Court also declared that strike illegal in Cause No. 105 of 2006. However, as a copy of that court's order was not produced and is not in the record of appeal before us, I ignore that contention.

20. Pursuant to **Section 31** of the repealed Trade Disputes Act, which I have said governed the dispute between the parties in this appeal, the Minister's said order of 13th October 2006 declaring the strike illegal came into force on the following day. If the respondent and the lecturers were aggrieved by that order, they were at liberty to challenge it before the Industrial Court under **Section 32** of the Trade Disputes Act. There is no evidence on record that they did that. It then follows that the strike remained illegal with the result that the respondent was entitled to summarily dismiss the lecturers under **Section 17(a)** of the repealed Employment Act Cap 226 of the Laws of Kenya, which, as I have said, also applies to the dispute in this matter, for absconding duty. However, as stated, on its own volition the appellant summarily dismissed two of the lecturers and terminated the services of the other three after paying them salary in lieu of notice. I

- will not disturb that decision.
21. The record also shows that the lecturers were paid their terminal benefits. As far as I am concerned, they had no further claim against the respondent even if their strike was legal.
 22. That disposes of this appeal but I would like to say something about the learned Judge's reliance on the ILO Conventions. As would be expected, the parties were divergent on this. Counsel for the appellant faulted the learned Judge for relying on the unratified ILO Convention. Counsel for the respondent on the other hand lauded her for that.
 23. **Article 2(6)** of the Constitution renders international Conventions ratified by Kenya part of the law of this country. The learned Judge relied upon some provisions of the ILO Convention 158 as well as the Report of the Committee of Experts on that Convention as well as the Digest on the Decisions and Principles of the Freedom of Association Committee of the ILO Governing Body, 5th Edition to declare the strike illegal. Although she appreciated that Kenya has not ratified the ILO Convention No. 158, on the premise that Kenya being a member of the ILO, it is bound by its international obligations. She also relied on the authority of Bangalore Principles on Domestic Application of International Human Rights Norms adopted by the Judicial Colloquium in India on 26th February 1988. Thus far, I entirely concur with the learned Judge. Kenya is a State party to the ILO, which it joined in 1964. It is therefore bound by the ILO conventions. Besides that, upon entry into force and its application by the international community, the ILO Convention No. 158 formed part of the international law. **Article 2(5)** of the Constitution also imports into the Kenyan legal framework principles of international law. The international decisions based on or interpreting that Convention therefore form part of the law of Kenya.
 24. The learned Judge, however, misapprehended the import of the Bangalore Principles and the provisions of the ILO Convention 158 and the jurisprudence emanating from them. For instance, she argued that the lecturers were victimized for their involvement in trade union activities. That is not correct. Paragraph 100 of the Report of the Committee of Experts on the ILO Convention and Recommendations in relation to Protection against Unjustified Dismissals that the learned Judge quoted talks of "*Union Membership or participation in Union activities outside working hours...*" There is no evidence that before the strike, the appellant had any issue with the lecturers being members of their trade union or being involved in trade union activities outside working hours. The Bangalore Principles apply "*where the domestic law—whether constitutional, statute or common law is uncertain or incomplete.*" As I have pointed out, our law is clear and complete on when a strike is illegal.
 25. The learned Judge also relied on the Digest on the Decisions and Principles of the Freedom of Association Committee of the ILO Governing Body, 5th Edition in dismissing the Minister's order declaring the strike illegal. Paragraph 628 of that Digest states that the "*[r]esponsibility for declaring a strike illegal should not lie with government, but with and independent body which has the confidence of the parties involved.*" That is persuasive authority. I would on my part prefer the provisions of the repealed Trade Disputes Act, under which the ultimate word on the legality of a strike lay with the Industrial Court which is an independent body. As I have said, being aggrieved by the Minister's order, the lecturers should have challenged it in the Industrial Court but they did not.
 26. Had the learned Judge appreciated these points, I believe she would not have declared the strike illegal.
 27. I concur with the learned trial Judge and my colleagues in rejecting the appellant's contention that it dismissed and/or terminated the services of the lecturers on grounds other than involvement in the strike. Those grounds had been there, some, for over five years. The main reason for the appellant's action against the lecturers was their participation in the strike and advising students not to report back to the university.
 28. For these reasons, I would on my part allow this appeal and set aside all the awards the learned Judge made in favour of the lecturers. However, as my colleagues are of a different view, the

decision of the Court shall be as proposed by Karanja, JA.

Dated and delivered this 6th day of November, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR

[1] Cap 233 of the Laws of Kenya

[2] Act No. 14 of 2007

[3] Cap 234 of the Laws of Kenya.

[4] The ILO Convention 158; the Report of the ILO Committee of Experts on the application of the Conventions and Recommendation in relation to the Protection Against Unjustified Dismissals; and the Digest and Principles of Freedom of Association Committee of the ILO Governing Body, 5th Edition.

[5] The Labour Relations Act 2007 which repealed the Trade Disputes Act and Employment Act 2007 which repealed the old Employment Act both commenced on 2/6/2008.

[6] Cap 226 of the Laws of Kenya.

[7] Cap 234 of the Laws of Kenya.